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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICI CURIAE OF THE MINNESOTA FAMILY COUNCIL, ILLINOIS FAMILY INSTITUTE, INDIANA FAMILY INSTITUTE, MASSACHUSETTS FAMILY INSTITUTE, NEW JERSEY FAMILY POLICY COUNCIL, NORTH CAROLINA FAMILY POLICY COUNCIL, OKLAHOMA FAMILY POLICY COUNCIL, OREGON CENTER FOR FAMILY POLICY, PALMETTO FAMILY COUNCIL, PENNSYLVANIA FAMILY INSTITUTE, ROCKY MOUNTAIN FAMILY COUNCIL, ROCKY MOUNTAIN FAMILY LEGAL FOUNDATION AND NORTHSTAR LEGAL CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are a group of statewide nonprofit organizations that work to promote and strengthen the family through improving public policy and educating the public. Amici view strong protection for religious liberty through the Religious Freedom Restoration Act (RFRA) as an important way to protect the family. Amici are responding to the brief submitted by the sixteen States and Territories that urges this Court to find RFRA unconstitutional. Descriptions of the amici are in the Appendix. Consent letters are on file at the Clerk's Office.

SUMMARY OF ARGUMENT

Amici urge this Court to uphold the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb *et seq.* (RFRA). This brief responds to the amici brief filed by the sixteen states and territories ("States' Brief"). The amici have great respect for the state attorneys general and the excellent job they do generally. However, their brief in this case mischaracterizes RFRA decisions to argue that courts have used RFRA to impose a variety of intolerable burdens on the states. But in all but one of the RFRA cases cited in the States' Brief, the RFRA claimant lost.

The question before this Court in this case is whether Congress has the constitutional authority to enact RFRA. It is irrelevant to that question whether RFRA has burdened state governments in a practical sense. Additionally, this brief will show that courts have consistently rejected attempts to use RFRA to impose sweeping or extreme requirements or prohibitions on the states.

If this Court declares RFRA to be unconstitutional, amici urges the Court to reexamine its decision in *Employment*

Division v. Smith, 494 U.S. 872 (1990), and give serious consideration to restoring the compelling state interest test as the test for Free Exercise Clause claims.

ARGUMENT

I.

THE LARGE NUMBER OF PRISONER LAWSUITS UNDER RFRA MAY BE A SERIOUS PROBLEM, BUT IT IS NOT A REASON TO DECLARE RFRA UNCONSTITUTIONAL

The States' Brief complains that RFRA has been used to impose federal control over prisons, "disrupt[ing] core functions of state governance." States' Brief at 1. But every case cited by the States' Brief shows that is not happening. The prisoners lost every RFRA case cited in the States' Brief. Courts imposed no injunctions on prison officials because the prisoners lost their RFRA claims. One would expect the States' Brief to have presented the best list of cases in which overzealous courts are afflicting state prisons with onerous RFRA-based injunctions. If those court decisions exist, the States' Brief did not refer to any of them.

The States' Brief claims that RFRA "has been used by racist inmates attempting to cloak their agendas in 'religion,' making it more difficult for corrections officials to limit the disruption and other consequences of such activities." States' Brief at 4. Yet in every case the States' Brief cites for this point, the prisoner lost:

Ochs v. Thalacker, 90 F.3d 293 (8th Cir. 1996) (white prisoner seeks segregation from nonwhite inmates under RFRA due to his white supremacists religious beliefs). **Prisoner lost**.

George v. Sullivan, 896 F.Supp. 895 (W.D.Wis. 1995) (white prisoner sues under RFRA seeking right to receive white supremacist literature). **Prisoner lost**.

United States v. Meyers, 906 F.Supp. 1494 (D.Wyo. 1995), *aff'd.*, 95 F.3d 1475 (10th Cir. 1996) (prison inmate claims right under RFRA to use marijuana). **Prisoner lost**.

The States' Brief also claims that prisoners have used RFRA to "distribute weapons or engage in other dangerous activities . . . ;" and "to frustrate prison restrictions on the use of long hair, medallions and 'colors' - gang identifiers." States' Brief at 5. But again, the prisoners who made those claims under RFRA lost the cases cited in the States' Brief.

Rust v. Clarke, 883 F.Supp. 1293 (D.Neb. 1995), *aff'd.*, 84 F.3d 841 (8th Cir. 1996) (prisoner who practices the Viking religion of Asatru asked for various religious items that could be used as weapons). **Prisoner lost**.

Emel v. Mensinger, 1996 WL 468673 (E.D. Pa. 1996) (satanists claimed RFRA right to burn Bibles in their cells). **Prisoners lost**.

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996) (prisoner who practices a Native American religion sought to keep his hair long and to use a sweat lodge). **Prisoner lost**.

Abordo v. Hawaii, 938 F.Supp. 656 (D.Hawaii 1996) (prisoner who practices a Native American religion objected to being forced to cut his hair). **Prisoner lost**.

Diaz v. Collins, 872 F.Supp. 353 (E.D.Tex. 1994) (prisoner who practices a Native American religion sought to

wear his hair long, obtain a medicine pouch and wear a head band). **Prisoner lost**.

The States' Brief also complains about the amount of prisoner lawsuits, that the prisoners are burdening the States by filing large numbers of RFRA cases. States' Brief at 2-6. The amici are sympathetic with the States' complaints about numerous prisoner cases. Congress enacted on April 26, 1996 the Prison Litigation Reform Act of 1996 (PL104-134, codified at 18 U.S.C. §3626). This law may significantly reduce the number of frivolous lawsuits filed by prisoners, including those filed under laws other than RFRA.

However, excessive prisoner litigation is irrelevant to determining whether Congress has the constitutional authority to pass RFRA or not. It is a policy concern that does not address the constitutional question before this Court.

The problem of excessive prisoner lawsuits did not begin with RFRA. Prisoners have successfully protected their right to petition for redress of grievances, to be free of racial discrimination and to have due process of law, *Turner v. Safley,* 482 U.S. 78, 84 (1987), as well as their Eighth Amendment rights. *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Hudson v. McMillian,* 503 U.S. 1 (1992). If RFRA vanished, prisoners would continue to file lawsuits under a myriad of other constitutional provisions.

The States may find it irritating or draining to fight these lawsuits in court, but a losing RFRA lawsuit does not impose any court order that "disrupt[s] core functions of state governance,"(States' Brief at 1). When courts reject plaintiffs' unreasonable or outlandish interpretations of RFRA, it shows that the system is working. RFRA should not be struck down because some people are allegedly misusing it.

II.

THE STATES' AMICI BRIEF DISTORTS THE RFRA CASE LAW TO PAINT A FALSE PICTURE THAT COURTS HAVE USED RFRA TO INTRUDE ON OTHER AREAS OF STATE AUTHORITY

The States' Brief incorrectly paints a dark and ominous picture of federal courts using RFRA to strip away state authority and to command the states to act according to the dictates of people with bizarre religious beliefs:

> In the three short years since RFRA was enacted, it has disrupted several core functions of State governance. Whether it is running prisons, educating children, defining criminal laws, or exercising other police powers, RFRA has undermined the traditional discretion given to the States in these areas.

States' Brief at 1. This is simply not happening. Of all the RFRA cases cited in the States' amici brief, the religious plaintiff prevailed over the government with a RFRA claim only once. If RFRA is being misused so frequently, why could the States not find any more examples?

The States' main complaint with RFRA is that they have to respond to RFRA suits at all. However, even in areas where the States have the power to impose reasonable regulations (*e.g.*, public schools, traffic, hunting), the States still must obey the Constitution. Successful lawsuits ensure that the States conform their laws to constitutional standards, not to interfere with areas traditionally left to state control.

Each area of law cited in the States' Brief shows the two problems of 1) citing cases in which the RFRA claim lost and 2) failing to acknowledge that state laws can violate the Constitution or federal law.

A. Home Schooling

The States' Brief complains that people have used RFRA to challenge home schooling regulations that enforce "minimal educational standards." States' Brief at 6. That brief refers to a RFRA case in which a home schooling mother unsuccessfully challenged home schooling regulations in Maryland. *Battles v. Anne Arundel County Board of Education*, 904 F.Supp. 471 (D. Md. 1995).

Yet courts have struck down many state home schooling laws because they violated the Constitution. For example, the Michigan Supreme Court used its state Free Exercise Clause to declare unconstitutional a state law requiring all students to be taught by state-certified teachers. *Michigan v. DeJonge*, 501 N.W.2d 127 (Mich. 1993). A number of courts have struck down a series of state compulsory attendance laws applied to home schooling on void for vagueness grounds. *See, e.g., Minnesota v. Newstrom*, 371 N.W.2d 533 (Minn. 1985); *Wisconsin v. Popanz*, 112 Wis.2d 166, 332 N.W.2d 750 (1983); *Roemhild v. Georgia,* 251 Ga. 569, 308 S.E.2d 154 (1983) and *Jeffrey v. O'Donnell*, 702 F.Supp. 513 (M.D.Pa. 1988) and 702 F.Supp. 516 (M.D.Pa. 1988).

When these courts struck down state home schooling statutes, they were finding that the state laws violated the Constitution. The courts were not interfering with an area traditionally left to the States. From time to time, a legislature will pass a law that violates the constitution, and it will be

challenged in court. RFRA is not the cause of that phenomenon. If RFRA disappeared today, there would still be challenges to state laws regulating home schooling if they are perceived as violating the constitutional rights of the families.

B. Public Schools

The States Brief also argues that RFRA has disrupted the states' oversight of public schools. Again, their brief cites three RFRA cases for this point. Yet in two of them, the plaintiffs making the RFRA claim lost.

In *Bauchman v. West High School,* 900 F.Supp. 254 (D.Utah 1995), a high school student sought an injunction to stop her high school choir from singing some songs with Christian religious content. The student based her main cause of action on the Establishment Clause, which makes this case basically irrelevant to a discussion of RFRA. The district court rejected the Establishment Clause claim, as the Eighth Circuit had done in a similar case, *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980). *See Bachman*, 900 F.Supp. at 267-270.

The student did make a secondary argument that the singing of religious songs also violated her rights under RFRA. The federal court rejected the RFRA claim because the school district allowed the student to opt out of singing the objectionable music. This is the normal relief granted to someone with a religious objection to doing something required of the government -- that the objector is exempted from the requirement:

> As discussed above, plaintiff in the instant case was permitted to be excused from any choir activities which she found to offend her

> religious beliefs. She declined this option, and instead continued to participate in practicing and performing all of the songs in the choir's repertoire, including those which were explicitly Christian religious in nature. In light of the lack of alleged facts demonstrating state coercion in this matter, this court finds that plaintiff has failed to state a claim that her religious beliefs were substantially burdened in violation of RFRA.

Bachman, 900 F.Supp. at 271. Therefore, the school district here was already offering the student the relief (an exemption from singing the objectionable music) that RFRA would have provided.

A federal court again rejected an apparently extreme interpretation of RFRA in *Helland v. South Bend Community School Corporation*, 93 F.3d 327 (7th Cir. 1996). In that case, a teacher filed a RFRA claim in court after a school district removed him from substitute teacher list because he failed to follow lesson plans, failed to control his students, and improperly interjected religion into his classrooms . The courts rejected the teachers' arguments that he was fired because he exercised his religion appropriately, not because he had done a questionable job as a teacher.

The only RFRA case cited in the States' Brief in which the RFRA claim prevailed over the government was *Cheema v. Thompson,* 67 F.3d 883 (9th Cir. 1995). The States' Brief misleading characterizes this case as using RFRA to create "a federal right to carry daggers to school." States' Brief at 6. A full explanation of the case reveals that the Ninth Circuit did not apply RFRA in such a bizarre way. The plaintiffs in the lawsuit were members of the Sikh religion from India, who

carry ceremonial knives called *kirpans*. The district court allowed the three Sikh students to carry their *kirpans* if they met these conditions:

> 1) the *kirpan* will be of the type demonstrated to the Board and to the District Court, that is: a dull blade, approximately 3 - 3 ½ inches in length with a total length of approximately 6 ½ - 7 inches including its sheath;
>
> 2) the *kirpan* will be sewn tightly to its sheath;
>
> 3) the *kirpan* will be worn on a cloth strap under the children's clothing so that it is not readily visible;
>
> 4) a designated official of the District may make reasonable inspections to confirm that the conditions specified about are being adhered to;
>
> 5) if any of the conditions specified above are violated, the student's privilege of wearing his or her *kirpan* may be suspended; and
>
> 6) the District will take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District and will take appropriate disciplinary action to prevent and redress such action, should it occur.

Cheema, 67 F.3d at 886.

Of course, if the school district in this case proved that the *kirpan* was a dangerous weapon that threatened the safety

of other students, then the RFRA claim by the three Sikh students would fail. Only because the majority of the Ninth Circuit panel was convinced that the *kirpan* did not pose a threat to other students was it permitted under RFRA. This is a case respecting the practice of an established world religion, formed centuries ago. This is not a case of RFRA putting weapons into the hands of youth gangs -- the Bloods, the Crips and the Sikhs.

C. Traffic and Hunting Laws.

The States Brief also criticizes RFRA for exposing state and local government to litigation "over such inherently local issues as state highway improvements intended to reduce accidents, nuisance abatement actions dealing with excessive holiday lighting and the applicability of otherwise unremarkable highway and hunting safety regulations." States' Brief at 7.

The States' Brief once again cites only cases in which the RFRA claim lost. This shows that the courts did not use RFRA to impose burdensome requirements on the state or local units of government.

In *Osborne v. Power*, 890 S.W.2d 570 (Ark. 1994), the Arkansas Supreme Court rejected the RFRA challenge by a homeowner ordered by local authorities to stop erecting huge Christmas light displays at his home. The Arkansas Supreme Court said "there is nothing about their religious beliefs which dictates that they must celebrate the Christmas season by a massive display of electric lights." *Osborne,* 890 S.W.2d at 572-73.

Similarly, the Ohio Court of Appeals rejected the RFRA argument of an Amish hunter who refused to wear

bright hunter orange clothing while hunting. *State v. Bontrager,* 1996 WL 612397 (Ohio Ct. of App., Oct. 19, 1996). That court found that hunting is not a central tenet of the Amish faith, that the requirement to wear the clothing did not burden the Amish hunter's religious convictions, and that the state had a compelling state interest to protect people from getting shot accidently.

The States in their amicus brief implicitly admit the weakness of their own arguments against RFRA by citing so many cases in which the courts rejected the RFRA claims:

> Whether the States ultimately defeat these claims of course is only half the matter; the fact that Congress has seized authority to legislate in these areas and compelled States to divert substantial resources in defending actions under the legislation itself encroaches on State sovereignty.

States' Brief at 7.

Here, the States basically admit that their main objection is that they do not like to respond to lawsuits based on federal law. But in our federal system, states must obey the Constitution, and litigants will argue in court that a state is violating their federal constitutional rights. And sometimes, the courts will agree that the states have violated the Constitution.

The States' Brief illustrates this point when it cites *State v. Miller,* 549 N.W.2d 235 (Wis. 1996).This is one of the two cases mentioned in the States' brief in which the religious believer prevailed on his religious liberty claim. However, the religious claimant did not win under RFRA, but the Wisconsin Constitution's Free Exercise Clause. *See Miller*, 549 N.W.2d

at 238, n.5.

In this case, the Wisconsin Supreme Court exempted Amish buggy drivers from compliance with a state law requiring slow moving vehicles to attach fluorescent orange triangles to the rear of their buggies. That court found that there was a less restrictive means to accomplish the state's compelling interest in maintaining traffic safety.

This was a state supreme court striking down a state law under its state constitution. The Minnesota and Michigan Supreme Courts have exempted Amish buggy drivers from similar legal requirements because of the state and federal free exercise clauses. *See State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) and *People v. Swartzentruber*, 170 Mich.App. 682, 429 N.W.2d 225 (1988). Although the Amish won their religious liberty exemptions in these cases, these are not extreme intrusions into areas States normally oversee.

Simply because such areas as education, traffic control hunting and zoning (which is at issue in the case now before this Court) have been regulated traditionally by the states, does not mean the states are free ignore constitutional constraints. RFRA is only one of many federal statutes and constitutional provisions that states must obey. This Court has ordered the states to obey federal law and the Constitution in the areas of education, zoning, traffic control and hunting:

Public Education: Public schools must not violate the freedom of speech, *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (student speech) and *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 385 (1993) (equal access); the Equal Protection Clause, *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial discrimination); Title IX of the Education Amendments of 1972, *Franklin v. Gwinnett County*

Public Schools, 503 U.S. 60 (1992); and the Individuals with Disabilities Education Act, *Florence County School District Four v. Carter,* 510 U.S. 7 (1993).

Zoning: Zoning ordinances may not violate the freedom of speech, *Schad v. Mount Ephraim,* 452 U.S. 61 (1981); the Takings Clause, *First Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); Fourteenth Amendment liberty interest in parenting and family, *Moore v. East Cleveland,* 431 U.S. 494 (1977); and the Equal Protection Clause, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) and *Arlington County Board v. Richards*, 434 U.S. 5 (1977).

Hunting - state laws regulating hunting must comply with the Equal Protection Clause and the Privileges and Immunities Clause, *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978); and various federal laws addressing sovereignty of Indian reservations, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Some have even argued unsuccessfully that Sunday closing laws containing restrictions on hunting and fishing regulations violate the Establishment Clause! *McGowan v. Maryland*, 366 U.S. 420, 423 (1961) and *Two Guys v. McGinley*, 366 U.S. 582, 587 (1961).

Traffic regulation - laws regulating traffic must conform with the Commerce Clause, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) and the Freedom of Speech Clause, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) and *Wooley v. Maynard*, 430 U.S. 705 (1977).

Therefore, the fact that States must defend their laws and actions in court and show that they are constitutional is nothing new. It is also appropriate under our constitutional system. RFRA extends that national tradition.

III.

IF THIS COURT FINDS RFRA UNCONSTITUTIONAL, THIS COURT SHOULD REOPEN THE QUESTION OF WHETHER THE COMPELLING STATE INTEREST TEST SHOULD APPLY IN FREE EXERCISE CASES

If this Court declares RFRA unconstitutional, it should revisit its decision in *Employment Division v. Smith,* 494 U.S. 872 (1990) and reexamine whether the compelling state interest test most accurately reflects the protections of the Free Exercise Clause. This issue was not briefed by the parties or the amici in *Smith.*

This Court found in *Smith* that the Framers of the Free Exercise Clause did not intend for it to protect people with religious-based objections to neutral laws of general applicability. *Smith,* 494 U.S. 872, 878-9 (1990).

However, such leading constitutional scholars as Professor Michael McConnell of the University of Chicago Law School, has argued that the Framers of the First Amendment did intend constitutional protection for religious adherents burdened by laws facially neutral toward religion. See M. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion,* 103 Harvard L.Rev. 1409 (1990).

During the three year period (1990-93) before RFRA was enacted and when *Employment Division v. Smith* stated the standard of protection for federal free exercise rights, lower courts misinterpreted *Smith* as a signal that religious liberty now rated as a second-class constitutional right. In *Salaam v. Lockhart,* 905 F.2d. 1168 (8th Cir. 1990), a prisoners' rights

case, the Eighth Circuit made the shocking statement that Americans' free exercise rights after *Smith* were no better than those of prisoners:

> We do not believe that the Supreme Court's recent decision *in Employment Div., Dep't of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), affects our analysis. *Smith* does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners.

Salaam, 905 F.2d at 1171. In fairness to the Eighth Circuit, this statement taken in context expresses despair over the state of religious liberty rights of private citizens.

In another prisoners' rights case called *Hunafa v. Murphy,* 907 F.2d 46 (7th Cir. 1990), the Seventh Circuit made a similar statement that following *Smith,* regular citizens had no more religious liberty protection than inmates in prison:

> The defendants have not cited to us the Supreme Court's recent decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), rendered after the appeal in this case was filed. *Smith* cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded.

Hunafa, 907 F.2d at 48.

This is hardly encouraging when lower courts view religious liberty protection in such a cramped way. Ten years ago, this Court interpreted the Free Exercise Clause as giving significant discretion to prison officials to restrict the religious activities of prisoners. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (prison rule infringing on religious liberty "valid if it is reasonably related to legitimate penological interests."). The lower courts interpreted *Employment Division v. Smith* as applying that standard to the rest of society. It is difficult to believe that the Framers of the Free Exercise Clause, who fought for individual liberty and limited government, would have intended the Constitution to protect religious freedom for the common man and woman to the same extent that it does prisoners.

The historical intent of the Framers of the Free Exercise Clause cannot be examined in isolation from the intent of the Framers to limit the reach of governmental power. both federal and state. At the time the First Amendment was ratified, federal and state authority regulated far fewer things than they do today. Therefore, there were far fewer areas than today where government regulation would conflict with a person's religious convictions.

For example, the case now before the case probably would have never happened at the time the First Amendment was ratified. It is doubtful that any township at the time had an ordinance to preserve historic buildings. At that time, a church would have no need for protection under the Free Exercise Clause that did not extend to neutral laws of general applicability, because the churches would have been free to demolish and expand their sanctuaries as they saw fit, without any governmental interference.

In another example, the conflict between the Amish and

the public school statutes in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), would not have arisen at the time the First Amendment was ratified because states did not have compulsory attendance laws or public schools. At that time, a family might have been adequately protected by a Free Exercise Clause that did not extend to neutral laws of general applicability, because the families would have been free to educate their children in the manner they thought proper, without any governmental interference.

Because the reach of government has expanded into so many new areas since the drafting of the Constitution, the compelling state interest test may today best reflect the intent of the Framers. The need for the compelling state interest test has increased over the years because individuals need protection from the growing reach of government.

Justice William Brennan made this point about the expanding presence of government in the lives of individuals in a speech in 1985 to Georgetown University Law School:

> But the days when common law property relationships dominated litigation and legal practice are past. To a growing extent economic existence now depends on less certain relationships with government -- licenses, employment, contracts, subsidies, unemployment benefits, tax exemptions, welfare and the like. Government participation in the economic existence of individuals is pervasive and deep. Administrative matters and other dealings with government are at the epicenter of the exploding law. We turn to government and to the law for controls which would never have been expected or tolerated

before this century. . .

Justice William J. Brennan, Jr., Text and Teaching Symposium, Georgetown University, Washington, D.C. October 12, 1985, printed in *The Great Debate: Interpreting Our Written Constitution*, published by the Federalist Society, 1986, p. 19.

Then-Justice Rehnquist, in his dissent in *Thomas v. Review Board*, 450 U.S. 707 (1981), made a similar point:

> . . . the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two clauses, since such legislation touches the individual at so many points in his life.

Thomas, 450 U.S. at 721.

In other words, government has grown so large that it collides with the lives of individuals much more than it did at the time of the framing of the Constitution.

Assuming that *Employment Division v. Smith* accurately lays out the test the Framers of the First Amendment envisioned for the Free Exercise Clause—we are still left with the fact that other parts of the Constitution have changed to allow government to grow far beyond the boundaries envisioned by the Framers.

It is highly unlikely that the reach of governmental power will shrink back to its boundaries of two centuries ago. That means that the *Smith* test leaves individuals defenseless and vulnerable in the face of the oversized governmental behemoth. During the period 1990-1993, after *Smith* was

handed down and before RFRA became law, federal courts almost always ruled against the religious adherent. Unless government gets out of many areas it regulates now, (which probably will not happen), the compelling state interest test offers the individual significant protection from the reach of big government.

CONCLUSION

Amici curiae urges this Court to affirm the Fifth Circuit's decision and uphold the constitutionality of the Religious Freedom Restoration Act, or, to reexamine and expand the protections for religious liberty provided for under the Free Exercise Clause as interpreted by *Employment Division v. Smith,* 494 U.S. 872 (1990).

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